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Articles

TITLE IX AFTER THIRTY-FOUR YEARS — RETALIATION IS NOT ALLOWED ACCORDING TO THE SUPREME COURT IN *JACKSON V. BIRMINGHAM* *BOARD OF EDUCATION*

SUE ANN MOTA*

A. INTRODUCTION

In 1972, Congress enacted Title IX to ensure that no person in the U.S. would be excluded from, denied the benefits of, or subjected to discrimination by any educational institution receiving federal funds on the basis of sex.¹ In its thirty-four year history, Title IX has been the subject of an implementing regulation;² a policy interpretation, including a three-prong test;³ a clarification of the three-prong test;⁴ a further clarification of that test;⁵ and

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1. See 20 U.S.C. § 1681(a) (2005) (providing for prohibition against discrimination and applicable exception). This author will use the statutory term “sex,” throughout this article. While acknowledging that many prefer the more current term “gender,” the statutory term will be used in this article only for the sake of consistency. For a further discussion of this statute, see *infra* notes 25-33 and accompanying text.

2. See 34 C.F.R. § 106 (1975) (noting implementing regulation effectuating Title IX of Education Amendments of 1972). For a further discussion of this statute, see *infra* notes 34-41 and accompanying text.

3. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) (noting origin of three-prong test). For a further discussion of the policy interpretation, see *infra* notes 42-57 and accompanying text.

4. See OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUCATION, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996), [hereinafter THREE-PART TEST] <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> (noting clarification of three prong-test). For a discussion of the three prong-test, see *infra* notes 70-72 and accompanying text.

5. See OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUCATION, FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS GUIDANCE REGARDING TITLE IX COMPLIANCE (Jul. 11, 2003), <http://www.ed.gov/about/offices/list/ocr/title9guidancefinal.pdf> [hereinafter OCR CLARIFICATION] (clarifying requirements and scope of Title IX).

most recently, additional clarification of the three prong-test⁶ and a guide to developing student interest surveys under Title IX.⁷ Title IX has also been the subject of extensive litigation, including Supreme Court decisions in *Cannon v. University of Chicago*,⁸ *North Haven Board of Education v. Bell*,⁹ *Grove City College v. Bell*,¹⁰ *Franklin v. Gwinnett County Public Schools*,¹¹ *Gebser v. Lago Vista Independent School District*,¹² *Davis v. Monroe County Board of Education*,¹³ and most recently in *Jackson v. Birmingham Board of Education (Jackson III)*.¹⁴ Title IX has additionally been the subject of numerous other circuit court decisions.¹⁵

6. See OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUCATION, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE POLICY: THREE-PART TEST — PART THREE (Mar. 17, 2005), <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> (clarifying requirements and scope of Title IX). For a further discussion of the additional clarification, see *infra* notes 97-99 and accompanying text.

7. See OFFICE FOR CIVIL RIGHTS, USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX (Mar. 2005), <http://www.nces.ed.gov/pubs2005/2005173.pdf> [hereinafter SURVEYS] (providing guidelines for conducting student interest surveys). For a further discussion of the student interest surveys, see *infra* notes 99-100 and accompanying text.

8. 441 U.S. 677 (1979). For a further discussion of *Cannon v. University of Chicago*, see *infra* notes 58-60 and accompanying text.

9. 456 U.S. 512 (1982). For a further discussion of *North Haven Board of Education v. Bell*, see *infra* note 60 and accompanying text.

10. 465 U.S. 555 (1984). For a further discussion of *Grove City College v. Bell*, see *infra* notes 61-62 and accompanying text.

11. 503 U.S. 60 (1992). For a further discussion of *Franklin v. Gwinnett County Public Schools*, see *infra* notes 63-68 and accompanying text.

12. 524 U.S. 274 (1998). For a further discussion of *Gebser v. Lago Vista Independent School District*, see *infra* notes 82-83 and accompanying text.

13. 526 U.S. 629 (1999). For a further discussion of *Davis v. Monroe County Board of Education*, see *infra* notes 84-89 and accompanying text.

14. 125 S. Ct. 1497 (2005). For a further discussion of *Jackson v. Birmingham Board of Education (Jackson III)*, see *infra* notes 133-59 and accompanying text.

15. See generally *Pederson v. La. State. Univ.*, 201 F.3d 388 (5th Cir. 2000) (suing university to field intercollegiate softball and soccer teams); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (bringing class action suit for demotion of women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status); *Horner v. Ky. High School Athletics Ass'n*, 43 F.3d 265 (6th Cir. 1994) (suing Kentucky Board of Education for discrimination concerning interscholastic activities); *Kelley v. Bd. of Tr.*, 35 F.3d 265 (7th Cir. 1994) (bringing suit for elimination of men's swim team); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (alleging discrimination for elimination of women's field hockey and gymnastics team); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (challenging discontinuation of women's fast pitch softball team), *cert. denied*, 510 U.S. 1004 (1993); *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993) (bringing action to force university to elevate women's hockey team to varsity level); Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003) (examining aspects of Title IX and continuing problems after thirty years of enforcement); Sue Ann Mota, *Title IX and Intercollegiate Athletics—The First Circuit Holds Brown University Not In Compliance*, 14 U. MIAMI ENT. SPORTS L.

Moreover, Title IX has sparked numerous debates and strong feelings on both sides. Some estimate that more than 350 men's athletic programs have been eliminated in response, at least in part, to Title IX's demands.¹⁶ Others, however, opine that, "while impressive strides have been made for female students since Title IX's inception thirty years ago, females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement."¹⁷

Because of the interest in, and controversy sparked by, Title IX, this Article addresses its statutory, regulatory, and Supreme Court jurisprudential history. This Article then analyzes *Jackson v. Birmingham Board of Education (Jackson III)*, the most recent Supreme Court decision on Title IX at the time of this publication.¹⁸ On March 29, 2005, the U.S. Supreme Court issued a landmark ruling in *Jackson III*¹⁹ that Title IX²⁰ encompasses a private right of action for a claim of retaliation against an individual who has alleged sex discrimination on behalf of another. While Title IX itself does not expressly mention retaliation, the Court majority held that prior Supreme Court decisions have consistently and broadly interpreted Title IX to include intentional sex discrimination.²¹ The Court also held that the Birmingham Board of Education should have realized discriminatory retaliation would not be allowed under

REV. 152 (1997) (discussing landmark decision concerning Title IX and Brown University's women's athletic program); Ted Riley Cheesebrough, Note, *Cohen v. Brown: I Am Woman, Hear Me Score*, 5 VILL. SPORTS & ENT. L.J. 295 (1998) (noting progress and continuing difficulties under Title IX); Dawn N. Zubrick, Note, *Striking Out with Title IX: Horner v. Kentucky High School Athletic Ass'n and the Sixth Circuit's Interpretation of Unintentional Discrimination Under Title IX and the Possibility of Recovering Monetary Damages*, 8 VILL. SPORTS & ENT. L.J. 421 (2002) (examining when compensatory damages are permitted under Title IX).

16. See generally David Klinker, Comment, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003) (detailing Title IX's negative effects on men's athletics); Megan K. Starace, Comment, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L.J. 189 (2001) (examining effects of Title IX on certain male sports). But see Nicole Stern, *Preserving and Protecting Title IX: An Analysis and History of Advocacy and Backlash*, 10 SPORTS LAW J. 155, 155 (2003) ("It's not women's sports that have reduced men's sports in this country. It's budget restraints, and the fact that highly visible men's sports are very expensive, so they've squeezed the other men's sports.").

17. Heckman, *supra* note 15, at 553.

18. See *Jackson III*, 125 S. Ct. at 1502 (discussing case's holding).

19. See *id.* at 1467 (describing holding of case and noting March 29, 2005 as date of decision). For a further discussion of *Jackson III*, see *infra* notes 133-59 and accompanying text.

20. 20 U.S.C. §§ 1681-88 (2005). For a further discussion of § 1681(c), see *infra* note 25 and accompanying text.

21. For a further discussion of *Jackson III* and the Court's interpretation, see *infra* notes 135-41 and accompanying text.

Title IX.²² Four Justices dissented, requiring the statute itself to show a plain intent to provide such a cause of action.²³ Given those facts, this Article analyzes this landmark case's majority and dissenting opinions. The analysis includes a comparison of Title IX, which now encompasses claims of retaliation, with other federal employment rights statutes also allowing retaliation claims. The Article also speculates as to a potentially different outcome if the case had been heard by the Court one year later, due to its changed composition. This Article concludes with recommendations for educational institutions post-*Jackson III*.²⁴ The most important lesson is that educational institutions receiving federal funds are now on notice that retaliation against an individual alleging sex discrimination constitutes an actionable offense under Title IX.

B. TITLE IX AND ITS THIRTY-FOUR YEAR HISTORY

This section discusses Title IX's statutory, regulatory, and Supreme Court jurisprudence in chronological order. Title IX of the Educational Amendment of 1972 provides that no person in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program²⁵ or activity²⁶ receiving federal financial assistance, on the basis of sex, with specified exceptions.²⁷ Title IX does not require any educational institution to grant preferential or disparate treatment to members of one sex to remedy an imbalance in the number or percentage of persons of that sex receiving federal

22. See *Jackson III*, 125 S. Ct. at 1509 ("The Board could not have realistically supposed that, given this context, it remained free to retaliate against those who reported sex discrimination.").

23. See *id.* at 1510 (Thomas, J., dissenting) ("[I]n cases in which a party asserts that a cause of action should be implied, we require that the statute itself evince a plain intent to provide such a cause of action.").

24. See *generally id.* (discussing educational institution's notice that retaliatory tactics may constitute actionable defense).

25. See 20 U.S.C. § 1681(c) (2005) ("For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education."). "[E]xcept that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department." *Id.*

26. See *id.* § 1687 (interpreting "program" and "activity" within meaning of statute).

27. See *id.* § 1681(a) (highlighting exceptions to prohibition against discrimination). This author notes exceptions to Title IX, including religious organizations, educational institutions, military training educational institutions, social fraternities and sororities, boy or girl conferences, father-son or mother-daughter activities at educational institutions, and beauty pageants. See *id.*

support in comparison to the total number or percentage of that sex in the community, state, section, or other area.²⁸ Title IX's expressed remedy is the cessation of federal funds to institutions in violation.²⁹ Title IX applies to all educational programs receiving federal funds,³⁰ not just athletic programs.³¹ Much of Title IX's regulation and litigation, however, has occurred around athletics, both at the high school³² and college levels.³³

In 1975, the Department of Health, Education, and Welfare ("HEW") promulgated an implementing regulation pursuant to Title IX.³⁴ This regulation states that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or be otherwise discriminated against in any interscholastic, intercollegiate, club, or intramural athletics"³⁵ This regulation requires educational institutions receiving federal funds to award athletic scholarships in proportion to the number of students participating in intercollegiate athletics.³⁶

According to the regulation, equal athletic opportunities should be afforded to members of both sexes.³⁷ When determining equal opportunities, some of the following factors may be considered: selection of sports, competition, practice schedules, medical

28. See 20 U.S.C. § 1681(b) (clarifying required means of achieving proportionality).

29. See *id.* § 1682 (noting remedy for violating Title IX directives). The Office for Civil Rights ("OCR") in the Department of Education ("DOE") has the power to terminate federal funding for institutions not in compliance. *But see* Gayle I. Horwitz, *Education Law Chapter: Athletics*, 5 GEO. J. GENDER & L. 311, 327 (2004) (noting as of 2004, however, OCR has yet to remove federal funding).

30. See 20 U.S.C. § 1681(c) (defining "educational institutions").

31. See *Berkelman v. S.F. Unified Sch. Dist.*, 501 F.2d 1264, 1270 (9th Cir. 1974) (ruling school district may not apply higher admissions standards to girls than boys).

32. See, e.g., *Brendan v. Indep. Sch. Dist.*, 477 F.2d 1292, 1295 (8th Cir. 1973) (deeming failure to offer female high school students right to participate in non-contact interscholastic sports when such teams were provided for male students discriminatorily).

33. For a discussion of Title IX circuit court cases, see *supra* note 15 and accompanying text.

34. See 34 C.F.R. § 106.41 (2005) (detailing prohibition of discrimination on basis of sex in athletic programs). Although some subsections of 34 C.F.R. § 106 deal with non-athletic issues, this Article will only examine relevant subsections.

35. *Id.* § 106.41(a) (requiring members of excluded sex must be allowed to try out for teams). *But see id.* § 106.41(b) (providing exception if team selection is based upon competitive skill or if activity is contact sport).

36. See *id.* § 106.37(c)(1) (explaining separate athletic scholarships for members of each sex may be provided as part of separate athletic teams).

37. See *id.* § 106.41(c) (noting requirements of regulation).

and training facilities, housing and dining facilities, and publicity.³⁸ The regulation also provides for sex-separated teams for contact sports, "including boxing, wrestling, rugby, ice hockey, football, and basketball"³⁹ Additionally, this regulation prohibits discrimination on the basis of sex in employment in education programs or activities.⁴⁰ Furthermore, the procedural provisions of Title VI of the Civil Rights Act of 1964 were adopted and incorporated into Title IX.⁴¹

In 1979, HEW published a Policy Interpretation in the Federal Register to clarify federal aid recipients' obligations under Title IX.⁴² The Policy Interpretation considered several areas in making a determination as to what constitutes "equal opportunity" in intercollegiate athletics.⁴³ These areas include: athletic scholarships, other program areas, and effective accommodation of interests and abilities. Reasonable opportunity for financial assistance awards must be provided for members of both sexes in proportion to the number of students of each sex participating in intercollegiate ath-

38. *See id.* The relevant statute section provides the following factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interest and abilities of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.

Id.

39. 34 C.F.R. § 106.41(c).

40. *See id.* § 106.51 ("No person shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination in employment . . . under any education program or activity [receiving federal funds]."). This requirement applies to recruitment, hiring, compensation rates, job assignments, collective bargaining agreements, job leave, fringe benefits, training, employer-sponsored activities, or any other term of employment. *Id.* § 106.51(b).

41. *See id.* § 106.71 (incorporating Title VI of Civil Rights Act into Title IX).

42. *See* Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) (elucidating obligations of federal aid recipients under Title IX).

43. *See id.* at 71,413-23 (stating evaluation methods under Title IX). In 1979, after issuance of the Policy Interpretation, HEW was split, and the DOE was created. The DOE never formally adopted the Policy Interpretation. Despite Title IX requirements, neither Congress nor the President approved the Policy Interpretation. *See* 20 U.S.C. § 1682 (2005); *see also* *Martin v. Occupational Safety and Health Review Comm'n.*, 499 U.S. 144, 150 (1991) (noting Policy Interpretation has received substantial deference from courts); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (discussing sufficiency of educational athletic program to avoid liability under Title IX); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (discussing Title IX violations when university discontinued women's varsity softball program).

letics.⁴⁴ The eleven other program areas are:⁴⁵ equipment and supplies,⁴⁶ scheduling of games and practice time,⁴⁷ travel and per diem allowance,⁴⁸ coaches,⁴⁹ tutors,⁵⁰ locker rooms, practice and

44. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,415 (describing applicable intercollegiate athletic programs). Compliance with this provision is examined by comparing each sex participating in intercollegiate athletics, but not to the student body population as a whole. See *id.* Also, compliance may still be found if a disparity results from legitimate, nondiscriminatory factors, such as team development or the higher cost of out-of-state tuition in some years. See *id.*

45. See *id.* (noting list is not exhaustive and is slightly expanded from 1975 implementing regulation).

46. See 45 C.F.R. § 86.41(c)(2) (2005); Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416 (codified as amended at 45 C.F.R. § 86.41(c)(2)) (defining "equipment and supplies" to include uniform and other apparel, sport-specific and general equipment and supplies, instructional devices, and conditioning and weight conditioning devices). Compliance is assessed by examining, among other factors, the equivalence for men and women of the quality, amount, suitability, maintenance, replacement, and availability of equipment and supplies. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416.

47. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416 (detailing factors considered in assessing institution's compliance with Title IX). Compliance in scheduling games and practice times is assessed using factors:

[E]xamining, among other[s] . . . the equivalence for men and women of: (1) The number of competitive events per sport; (2) The number and length of practice opportunities; (3) The time of day competitive events . . . ; (4) The time of day practice opportunities are scheduled; and (5) The opportunities to engage in available pre-season and post-season competition.

Id.

48. See *id.* (setting forth factors for consideration in evaluating institution's equal opportunities). Compliance in "Travel and Per Diem Allowances" is "assessed by examining, among other factors, the equivalence for men and women of: (1) Modes of transportation; (2) Housing furnished during travel; (3) Length of stay before and after competitive events; (4) Per diem allowances; and (5) Dining arrangements." *Id.*

49. See *id.* (enumerating areas considered in determining school's compliance with Title IX regulation). Under "Coaching and Academic Tutoring," compliance with the opportunity to receive coaching is "assessed by . . . : (a) Relative availability of full-time coaches; (b) Relative availability of part-time and assistant coaches; and (c) Relative availability of graduate assistants." *Id.*

50. See *id.* (describing additional grounds for violation of Title IX). Under the "Assignment and Compensation of Tutors," in general, a violation will be found only where compensation or assignment policies or practices deny male and female athletes equivalent coaching in quality, availability, and nature. See 45 C.F.R. § 86.41(c)(6) (2005). Compensation of coaches is assessed by examining, among other things, the coaches of men's and women's teams for equivalence in: "(a) Rate of compensation (per sport, per season); (b) Duration of contracts; (c) Conditions relating to contract renewal; (d) Experience; (e) Nature of coaching duties performed; (f) Working conditions; and (g) Other terms and conditions of employment." *Id.*

competitive facilities,⁵¹ medical and training facilities and services,⁵² housing and dining facilities and services,⁵³ publicity,⁵⁴ support services,⁵⁵ and recruitment of student athletes.⁵⁶

Effective accommodation under the Policy Interpretation is assessed using a three-prong test; an institution, however, must only comply with one of the prongs. The three prongs are: (1) whether the participation opportunities are provided in numbers substantially proportional to enrollments; (2) whether there is a history and continuing practice of program expansion for the underrepresented sex; or (3) whether the interests and abilities of the underrepresented sex have been fully and effectively accommodated.⁵⁷

In addition to the 1979 Policy Interpretation, the U.S. Supreme Court decided in *Cannon v. University of Chicago*,⁵⁸ that Title IX does provide for a private right of action, although not expressly

51. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416-17 (listing factors examined when assessing institution's fulfillment of equal opportunities under Title IX). Under this provision, compliance is assessed by determining equivalency in: "(1) Quality and availability of the facilities provided for practice and competitive events; (2) Exclusivity of use of [such] facilities . . .; (3) Availability of locker rooms; (4) Quality of locker rooms; (5) Maintenance of practice and competitive facilities; and (6) Preparation of facilities for practice and competitive events." *Id.*

52. See *id.* (enumerating additional factors for Title IX compliance). Under the provision of "Medical and Training Facilities and Services," compliance is assessed by equivalency in: "(1) Availability of medical personnel and assistance; (2) Health, accident and injury insurance coverage; (3) Availability and quality of weight and training facilities; (4) Availability and quality of conditioning facilities; and (5) Availability and qualifications of athletic trainers." *Id.*

53. See *id.* (providing areas to be evaluated for determining Title IX compliance). Under the provision of "Housing and Dining Facilities and Services," compliance is assessed by examining whether men's and women's opportunities are equivalent in housing provided, as well as special services included as a part of the housing, such as laundry, maid, and parking services. See *id.*

54. See *id.* (detailing additional areas for evaluating compliance with Title IX). "Publicity" compliance is assessed by equivalence in: "(1) Availability and quality of sports information personnel; (2) Access to other publicity resources. . .; and (3) Quantity and quality of publications and other promotional devices. . ." *Id.*

55. See *id.* (providing compliance is assessed by examining amount of administrative, clerical, and secretarial assistance provided).

56. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416 (assessing compliance by examining recruitment practices to see if they need modification). Such an examination will determine if there are substantially equal opportunities to recruit, whether resources "are equivalently adequate to meet [recruiting] needs. . .", and whether there is "a disproportionately limiting effect" on recruitment. *Id.*

57. See *id.* at 71,418 (announcing three main ways in which institutions' compliance is evaluated under Title IX).

58. 441 U.S. 677 (1979) (addressing whether plaintiff had private cause of action under Title IX). Notably, *Cannon* is not an athletics case. The plaintiff,

authorized by the statute. The plaintiff prevailed because she was discriminated against on the basis of sex. The Court recognized the case as a limited situation in which all the circumstances supported an implied remedy, but suggested that the better approach would be for Congress to specify these rights.⁵⁹ In his concurrence, Justice Rehnquist stated that “this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.”⁶⁰ Then, in *Grove City College v. Bell*,⁶¹ the Supreme Court narrowly interpreted the “program or activity” Title IX language and effectively removed athletic departments from Title IX’s coverage. The Civil Rights Restoration Act of 1987 re-established broad institution-wide application of the civil rights statutory provisions, including Title IX, for any part of the federally funded institution.⁶²

In 1992, the Supreme Court held in *Franklin v. Gwinnett County Public Schools*⁶³ that the implied right of private action under Title IX recognized in *Cannon v. University of Chicago* supports a claim for monetary damages.⁶⁴ The Court held that there is a traditional presumption favoring the availability of relief for violation of a federal right and that the passage of the Civil Rights Remedies Equalization Act of 1986⁶⁵ and the Civil Rights Restoration Act of 1987⁶⁶ implied that Congress did not intend to limit remedies.⁶⁷ Justice Scalia,

Geraldine Cannon, alleged that she was denied admission to medical school because she was a woman. *See id.* at 680.

59. *See id.* at 717 (recognizing lack of explicit statutory reference to private right of action under Title IX).

60. *Id.* at 718 (Rehnquist, J., concurring) (emphasizing importance of statutory construction to ensure Congressional intent). The second Supreme Court decision on Title IX occurred in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), when the Court upheld the validity of certain Title IX regulations.

61. 465 U.S. 555, 573-74 (1984) (stating holding of case).

62. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687) (applying civil rights regulations statutes to federal fund recipients irrespective of allocation or distribution of specific funds to institution).

63. 503 U.S. 60 (1992).

64. *See id.* at 72 (upholding monetary damages based on implied right recognized in *Cannon*). Although not an athletics case *per se*, the plaintiff in *Franklin* alleged that a sports coach and teacher sexually harassed her. *See id.* at 63-64. The school investigated, but allegedly took no further action, and actually discouraged Franklin from pressing charges. *See id.*

65. 42 U.S.C. § 2000d-7(a) (2005) (abrogating state’s sovereign immunity under Eleventh Amendment when state accepts federal funds under certain federal statutes including Title IX).

66. 20 U.S.C. § 1687 (2000).

67. *See Franklin*, 503 U.S. at 66 (asserting Court presumes all remedies available, “unless Congress has expressly indicated otherwise”).

joined by Chief Justice Rehnquist and Justice Thomas, concurred in the disposition of the case, but they stated that the notion of implied causes of action should perhaps be abandoned, especially where the Court requires limitations on remedies to be expressly stated.⁶⁸

In 1996, the Office for Civil Rights ("OCR"), the enforcement agency for Title IX within the Department of Education ("DOE"),⁶⁹ issued a "Clarification of Intercollegiate Athletics Policy Guidance: The Three Prong Test."⁷⁰ The Clarification maintained existing standards and reiterated that only one prong needed to be satisfied for a school to be compliant with Title IX.⁷¹ While the Policy Interpretation is tailored to intercollegiate athletics, the general principles of both the Policy Interpretation and the Clarification also apply to elementary and secondary interscholastic programs.⁷²

In 1997, the Equal Employment Opportunity Commission ("EEOC") issued an "Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions."⁷³ Studies showed salary differentials between the head and assistant coaches of men's and women's teams in educational institutions. According to the NCAA, men's sports in Division I institutions received sixty percent of money budgeted for the head coaches' salaries and seventy-six percent of the assistant coaches' salaries.⁷⁴

68. *See id.* at 77-78 (Scalia, J., concurring) (criticizing majority for explicit statutory indication of limiting remedies despite allowing implied right of action).

69. *See* 20 U.S.C. § 3441 (a)(3) (2005) (authorizing transfer of various responsibilities under HEW, including enforcement of Title IX, to OCR secretary). Prior to this, in 1990, the OCR issued a "Title IX Investigator's Manual."

70. *See* THREE-PART TEST, *supra* note 4 (attempting to clarify test's legal intricacies).

71. *See id.* (clarifying standard of Title IX regulations). Under the proportionality prong, for example, if a school's population was 52 percent male and 48 percent female, and the student athlete proportion was the same as the general student population, the institution would not have to fine-tune its program if males in the student body dropped to 51 percent. *See id.* Under effective accommodation, the OCR will consider whether there is: 1) an unmet interest in a particular sport; 2) a sufficient ability to sustain a team in the sport; and 3) a reasonable expectation of competition for the team. *See id.* If all three conditions are present, the OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex. *See id.*

72. *See id.* (summarizing Title IX's broad scope of intercollegiate, elementary, and secondary programs).

73. *See* U.S. EMPLOYMENT OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (Oct. 29, 1997), <http://www.eeoc.gov/policy/docs/coaches.html> [hereinafter EEOC ENFORCEMENT GUIDANCE] (examining differences in compensation between male and female coaches).

74. *See id.* (providing statistical data on athletic coach pay differentials).

The federal Equal Pay Act prohibits unequal pay for equal work on the basis of sex if the performance requires equal skill, effort, and responsibility under similar working conditions.⁷⁵ Title VII prohibits discrimination on the basis of sex, as well as race, color, religion, and national origin, in compensation, terms, conditions, and privileges of employment.⁷⁶ According to the EEOC, there is considerable overlap between the two statutes. Once the plaintiff shows that the jobs are substantially equal and the plaintiff is paid less, the burden shifts to the employer to show an affirmative defense.⁷⁷ Under the Equal Pay Act, some defenses for the existence of differential pay are seniority, merit, quantity or quality of production, or any factor other than sex.⁷⁸ The EEOC Enforcement Guidance stated that the EEOC is aware of the disparities in pay for coaches in educational institutions and will analyze such cases carefully.⁷⁹

In 1998, the OCR issued a "Policy Guidance for Athletic Scholarships."⁸⁰ On the twenty-fifth anniversary of Title IX, twenty-five educational institutions had complaints filed against them with the OCR, alleging noncompliance with Title IX in the area of athletic scholarships. Bowling Green State University ("BGSU") was one of the institutions, and the former general counsel for BGSU requested guidance from the EEOC. In a letter, the EEOC stated that exact proportionality down to the last dollar is not required. Rather, on a case-by-case basis, any disparity can take into account nondiscriminatory issues, and "if any unexplained disparity is one percent or less of the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based upon legitimate nondiscriminatory factors."⁸¹

75. See 29 U.S.C. § 206(d)(1) (2000) (detailing prohibitions on discrimination regarding equal pay).

76. See Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(2) (2000) (providing regulations prohibiting employment discrimination).

77. See EEOC ENFORCEMENT GUIDANCE, *supra* note 73 (explaining burden-shifting claim).

78. See 29 U.S.C. § 206(d)(1) (2000) (detailing defenses to charges of discriminatory compensation).

79. See EEOC ENFORCEMENT GUIDANCE, *supra* note 73 (explicating policies on athletic coaches' salaries among educational institutions).

80. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, DEAR COLLEAGUE LETTER: BOWLING GREEN STATE UNIVERSITY (July 23, 1998), <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> (providing further guidance on Title IX requirements for athletic scholarships).

81. *Id.* (clarifying proportionality requirement as applied to athletic scholarships).

In 1998, the Supreme Court held in a five-to-four decision that a school district may not be liable for damages stemming from an implied right of action under Title IX for sexual harassment of a student by a teacher unless a school district official, authorized to take correct measures, had both actual notice of and was indifferent to the teacher's misconduct.⁸² In *Gebser v. Lago Vista Independent School District*, the majority held that unless Congress speaks directly on the subject, "we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference."⁸³

Contrastingly, in *Davis v. Monroe County Board of Education*, a five-to-four decision written by Justice O'Connor, the Supreme Court held that a private action is available against a public school board for Title IX sex discrimination if the board acted with deliberate indifference to acts of student-on-student sexual harassment which were sufficiently severe, pervasive, and objectively offensive.⁸⁴ The dissent in *Davis*, authored by Justice Kennedy and joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, asserted that because Title IX was enacted under the Constitution's Spending Clause, limitations existed requiring states to have clear notice of their monetary liability.⁸⁵ The dissent found it "striking" that Title IX does not create any cause of action and the only private cause of action was judicially implied in *Cannon v. University of Chicago*.⁸⁶ The dissent also had difficulty with the majority's holding because

82. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (O'Connor, J., majority) (detailing importance of notice requirement). A Gebser high school student had a sexual relationship with one of her teachers. Neither Gebser, nor the teacher involved, reported the relationship. See *id.* at 278. The teacher was arrested and fired after the pair was caught engaged in sex. The school district had not distributed an official grievance procedure or anti-harassment policy, although it was required to do so by federal regulations. See *id.* After other students' parents complained about this teacher's offensive remarks in class, the principal talked to the teacher, but did not report the teacher to the superintendent. See *id.*

83. *Id.* at 292-93. The majority noted that an individual still may have a cause of action against the school district under state law, against the teacher in his or her individual capacity under state law, or under 42 U.S.C. § 1983. See *id.* Justices Stevens, Souter, Breyer, and Ginsburg dissented. See generally David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311 (2004) (discussing *Gebser* decision and concluding Supreme Court erroneously removed agency principles from Title IX sexual harassment cases).

84. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (summarizing holding of case).

85. See *id.* at 656-57 (Kennedy, J., dissenting) (discussing contextual background of Title IX).

86. See *id.* at 656 (Kennedy, J., dissenting) (discussing significance of *Cannon v. University of Chicago*, 441 U.S. 677 (1979)).

Title IX does not give schools clear, "unambiguous notice that they are liable in damages for failure to remedy discrimination by their students."⁸⁷ Therefore, the dissent concluded that the discrimination in *Davis* was not authorized by or in accordance with actions by the federal grant recipient.⁸⁸ Thus, they opined that the majority's ruling would bring more suits, causing serious financial burdens on school districts, taxpayers, and school children.⁸⁹

In 2001, the Supreme Court heard *Alexander v. Sandoval*,⁹⁰ a case brought under Title VI of the Civil Rights Act of 1964⁹¹ as opposed to Title IX.⁹² The court held that private individuals do not have a right of action to enforce disparate-impact regulations.⁹³ In a five-to-four decision authored by Justice Scalia, the Court held that Title VI as enacted or amended does not display an intent to create a private right of action, and therefore, no such right exists.⁹⁴

The DOE created a Commission on Opportunities in Athletics in 2002, which issued a report in 2003 entitled "*Open to All*": *Title IX at Thirty*.⁹⁵ Shortly thereafter, the OCR issued a "Further Clarification of Athletics Policy Guidance Regarding Title IX Compliance," stating that elimination of teams is not favored, and it would seek remedies that preserve rather than eliminate athletic opportunities.⁹⁶

In March 2005, the OCR issued an "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test- Part Three"

87. *Id.* at 658 (Kennedy, J., dissenting) (analyzing majority opinion).

88. *See id.* at 659 (Kennedy, J., dissenting) (contending that liability for discrimination should not be imputed to school).

89. *See Davis*, 526 U.S. at 686 (Kennedy, J., dissenting) (summarizing dissent).

90. *See* 532 U.S. 275, 293 (2001) (explaining holding). Chief Justice Rehnquist, Justices O'Connor, Kennedy, and Thomas joined Justice Scalia. *Sandoval* is not a Title IX case. In *Sandoval*, an Alabama resident initiated a class action suit over Alabama's "English-only" rule, which precluded otherwise qualified Alabama drivers from obtaining an Alabama driver's license because they were not fluent in English. *See id.* at 278. For a further discussion of *Sandoval* see generally Brianne J. Gorod, *The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939 (2003-04) (examining role of administrative agencies in determining private rights of action from statutes).

91. 42 U.S.C. §§ 2000(d)-2000(d)(7) (2000).

92. 20 U.S.C. § 1681(c) (2005). For a general description of Title IX provisions, see *supra* notes 25-29.

93. *See Sandoval*, 532 U.S. at 293 (holding no private right of action under Title VI for disparate impact claims).

94. *See id.* at 293 (asserting case's final conclusion).

95. *See* Dep't of Education (Feb. 28, 2003), <http://www.ed.gov/about/bd-scomm/list/athletics/tide9report.pdf> (examining current progress and impact of Title IX).

96. *See* OCR CLARIFICATION, *supra* note 5 (clarifying Title IX to readers).

("Clarification III").⁹⁷ The OCR reiterated that each of the three prongs acts as a safe harbor.⁹⁸ Clarification III has also sparked controversies. In fact, on Title IX's thirty-third anniversary, the NCAA repeated its request that the DOE withdraw the Clarification.⁹⁹ The OCR issued a Model Survey, which could be used to determine whether the interests and abilities of the under-represented sex were effectively accommodated.¹⁰⁰ Also in March 2005, the U.S. Supreme Court heard *Jackson v. Birmingham Board of*

97. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUCATION (March 17, 2005), <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter CLARIFICATION III COVER LETTER] (providing further clarification to schools for compliance with option three of three-part test); see also Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 453-57 (2004) (examining Blue Ribbon Commission's findings and impact on Title IX).

98. See CLARIFICATION III COVER LETTER, *supra* note 97 (stressing three prongs equally serve as safe harbor). According to Clarification III, of the 130 institutions investigated by the OCR from 1992-2003, two-thirds used the third prong: the effective accommodation of interests and abilities. See *id.* at v. The OCR found that many institutions were uncertain of their obligations under part three of the test and thus, sought to clarify the applicable factors to be considered in determining compliance. See *id.* Under this prong, an institution is in compliance, unless there exists, for the underrepresented sex, a sport for which all three conditions are met: unmet interest sufficient to sustain a varsity team in the sport(s); sufficient ability to sustain an intercollegiate team in the sport(s); and reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. See *id.* at 4.

99. See Press Release, NCAA, NCAA Urges Federal Government to Rescind Title IX Clarification (June 22, 2005), available at http://www2.ncaa.org/media_and_events/association_news/association_updates/2005/june/0622_title9.html (requesting OCR to withdraw clarification). This author opines that both the DOE and NCAA, esteemed organizations, need to work together to help educational institutions comply. The NCAA Division I recertification process requires a gender equity plan including the Policy Interpretation's provisions. See generally NCAA, Division I Athletics Certification Handbook 2005-06 (May 2005), http://www.ncaa.org/library/membership/d1-athletics-cert-handbook/2005-06/2005-06_d1_athletics_certification_handbook.pdf. While leaving it up to the educational institution to decide how to achieve Title IX compliance for those institutions choosing the proportionality prong of the three-part test, it is very difficult to achieve proportionality when football is involved. If the NCAA objects to the DOE's newest clarification, the NCAA needs to assist institutions by other means, such as by reducing football scholarship funds. See Brake, *supra* note 97, at 469-71 (discussing competing arguments regarding cutting budgets on men's "revenue sports" to achieve Title IX compliance).

100. See SURVEYS, *supra* note 7 (mentioning use of student interest surveys). The "Survey" is actually a census. Schools must minimally include all varsity sports, including emerging sports. Thirty-six schools used the first prong, proportionate participation opportunities as compared to the student body. Only eight selected the second prong where the school shows "a history and continuing practice of program expansion" corresponding to that sex's interest. *Id.* at 2-3.

*Education (Jackson III)*¹⁰¹ to decide whether Title IX's implied right of action encompasses claims of retaliation.

C. CLAIMS OF RETALIATION UNDER TITLE IX:
JACKSON V. BIRMINGHAM BOARD OF EDUCATION

Three federal circuit courts of appeals have examined the issue of whether retaliation claims are actionable under Title IX. Both the Fourth Circuit Court of Appeals¹⁰² and the Fifth Circuit Court of Appeals¹⁰³ held that retaliation claims are actionable. In 2002, however, the Eleventh Circuit Court of Appeals, in *Jackson v. Birmingham Board of Education (Jackson I)*, held that such claims are not actionable.¹⁰⁴ The federal circuits were thus split, and the U.S. Supreme Court granted *certiorari* to decide this issue.¹⁰⁵

In *Preston v. Commonwealth of Virginia*, the plaintiff, a New River Community College counselor for student support services, filed discrimination claims on the basis of race and gender with the EEOC and the OCR in 1984. In 1985 and 1989, she applied for, but was denied, other positions on campus. She claimed she was denied in retaliation for the 1984 discrimination charges.¹⁰⁶

A jury held the College had retaliated against Preston in considering her for the 1989 position, but determined she would have not been given the position even absent discrimination. The district court thus held she was not entitled to damages.¹⁰⁷ The Fourth Circuit affirmed.¹⁰⁸ While Preston lost her case, the Court

101. 125 S. Ct. 1497 (2005). For a further discussion of the Supreme Court's granting writ of certiorari in *Jackson*, see *infra* note 133 and accompanying text.

102. See generally *Preston v. Commonwealth of Va.*, 31 F.3d 203 (4th Cir. 1994) (finding retaliation claims actionable).

103. See *Lowrey v. Tex. A & M Univ. System*, 117 F.3d 242, 254 (5th Cir. 1997) (upholding private right of action for retaliation claim under Title IX).

104. See 309 F.3d 1333, 1338 (11th Cir. 2002) (holding retaliation claims under Title IX not within statute's prohibited conduct), *rev'd*, 544 U.S. 167 (2005).

105. See generally *Jackson v. Birmingham Bd. of Educ. (Jackson II)*, 542 U.S. 903 (2004) (granting writ of certiorari); see also Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does Sandoval or Sullivan Control This Question?*, 35 SETON HALL L. REV. 47, 52, 104-07 (2004) (concluding courts should find private rights of action for retaliation claims under Title VI and Title IX).

106. See *Preston*, 31 F.3d at 205 (noting school denied Preston other job positions). The district court initially granted summary judgment against Preston on her Title VII case and dismissed her Title IX case. See *id.* The Court of Appeals for the Fourth Circuit reversed in part and remanded for further proceedings. See *Preston v. Commonwealth of Va.*, 1991 U.S. App. LEXIS 18824, at *8-9 (4th Cir. Aug. 16, 1991).

107. See *Preston*, 31 F.3d at 204-05 (stating Preston was retaliated against but would not have received position even absent discrimination).

108. See *id.* at 208-09 (affirming district court's holding).

of Appeals for the Fourth Circuit recognized that retaliation against an employee for filing a claim of gender discrimination under Title IX is actionable.¹⁰⁹

In *Lowrey v. Texas A & M University System*, 117 F.3d 242 (5th Cir. 1997), the plaintiff was the head women's basketball coach at Tarleton State University and was named Women's Athletic Coordinator in 1992. In 1993, Lowrey served on a Gender Equity Task Force, which was responsible for identifying violations of Title VII and Title IX in the athletics department. That same year, after the Task Force report was submitted, Lowrey applied for, but was denied, the position of Athletics Director. In 1994, Lowrey was removed from the Women's Athletic Coordinator position, but remained as the women's basketball coach.

Lowrey filed suit in 1995 for employment discrimination and retaliation under Title IX, alleging employment discrimination on the basis of sex, misallocation of resources between male and female student athletes, and continuing retaliation by denying her the Athletic Director position and removing her from the Women's Athletic Coordinator position.¹¹⁰ After she filed suit, the Court of Appeals for the Fifth Circuit decided *Lakoski v. James*, holding that Title IX does not provide a private right of action for claims of employment discrimination based on sex.¹¹¹ Texas A & M University then filed a motion to dismiss Lowrey's case based on *Lakoski*; Lowrey moved to amend her complaint to add causes of action under Title VII, the First, Fifth, and Fourteenth Amendments, the Equal Pay Act, and 42 U.S.C. § 1983.¹¹² The district court dismissed Lowrey's complaint without first ruling on her motion to amend.¹¹³

In 1996, Lowrey refiled suit alleging the same claims she sought to add in her amended complaint, except for the Title IX claim. The Fifth Circuit held that the trial court abused its discretion in denying her leave to amend, but the district court's erroneous denial did not divest it of jurisdiction over the Title IX claim, on appeal.¹¹⁴ Further, the Fifth Circuit agreed with Lowrey that a

109. See *id.* at 206 (recognizing retaliation claims as actionable).

110. See *Lowrey v. Tex. A & M Univ. System*, 117 F.3d 242, 244-45 (5th Cir. 1997) (listing Lowrey's allegations). Lowrey also joined a state law claim for intentional infliction of emotion distress. See *id.*

111. See 66 F.3d 751, 758 (5th Cir. 1995) (holding Title IX does not allow right of action for sex-based employment discrimination).

112. See *Lowrey*, 117 F.3d at 245 (detailing procedural history).

113. See *id.* (explaining district court's ruling).

114. See *id.* at 246 (holding district court abused its discretion in denying plaintiff leave to amend complaint). Nevertheless, the court acknowledged that the district court's refusal to allow Lowrey to amend her complaint was moot be-

retaliation claim falls under Title IX and is not preempted by Title VII.¹¹⁵ Nevertheless, to state a claim for retaliation under Title IX, the court required Lowrey to rely exclusively on Title IX violations, not Title VII violations.¹¹⁶ The court concluded that while Title IX does not explicitly create a private right of action for retaliation, such a course of action does exist.¹¹⁷ Because Title IX creates an implied right of action under *Cannon v. University of Chicago*,¹¹⁸ and a private claim for damages under *Franklin v. Gwinnett County Public Schools*,¹¹⁹ the Fifth Circuit held that Title IX likewise implies a private right of action for retaliation.¹²⁰ In 2005, the U.S. Supreme Court agreed with the Fifth Circuit.¹²¹

In *Jackson I*, the Eleventh Circuit held that Title IX does not imply a private right of action for non-victims of gender discrimination, but it does for those who suffer retaliation because they have complained about others' gender discrimination.¹²² The plaintiff, a physical education teacher and girls' basketball coach at Ensley High School, complained of the differential treatment afforded to the girls' basketball team concerning funding and access to sports equipment and facilities to no avail.¹²³ In May 2004, Jackson was dismissed from his coaching position, despite remaining as a tenured teacher. Jackson filed suit for retaliation under Title IX. The

cause Lowrey filed a subsequent action that included all the claims she sought to add in her amended complaint. *See id.*

115. *See id.* at 247 (holding retaliation claim part of remedies included in Title IX). The court stated that the "relationship between [T]itle VII and [T]itle IX is complex, and never more so than in the instant case." *Id.*

116. *See id.* at 248 (stating Lowrey must proceed solely on Title IX violations based on *Lakoski* principle of preemption for Title VII claims). The anti-retaliation provisions of Title VII and Title IX are not identical. Title VII provides no remedy for retaliation against individuals who raise Title IX claims. *See id.* at 248-49.

117. *See Lowrey*, 117 F.3d at 249-51 (explaining absence of private right of action by Lowrey, on behalf of alleged victims, but entitled her to private right of action for retaliation claim under Title IX).

118. 441 U.S. 677 (1979). For a further discussion of *Cannon*, *see supra* notes 58-60 and accompanying text.

119. 503 U.S. 60 (1992). For a further discussion of *Franklin*, *see supra* notes 63-68 and accompanying text.

120. *See Lowrey*, 117 F.3d at 253 (concluding Title IX implies private right of action for retaliation). The court thus held that Lowrey could proceed with her Title IX retaliation claim but not her Title IX employment discrimination claim. *See id.* at 254.

121. *See Jackson III*, 125 S. Ct. 1497, 1509-10 (2005) (stating holding, following *Lowrey*, 117 F.3d at 252).

122. *See Jackson I*, 309 F.3d 1333, 1347-48 (11th Cir. 2002), *rev'd*, 544 U.S. 167 (2005) (holding Title IX does not imply private right of action for non-victim of gender discrimination who complains of others' suffering from discrimination).

123. *See id.* at 1335 (stating background facts leading to plaintiff's suit).

district court dismissed his complaint, and the Eleventh Circuit affirmed in *Jackson v. Birmingham Board of Education (Jackson I)*.¹²⁴

The court found that neither Title IX itself¹²⁵ nor its regulations¹²⁶ imply a private right of action for retaliation.¹²⁷ Because *Jackson I*¹²⁸ was the first appellate case examining this issue,¹²⁹ after *Alexander v. Sandoval*,¹³⁰ the appellate court did not imply a private right of action in Title VI cases.¹³¹ Not only did the court find no statutory intent, it found that even if Title IX did prevent and remedy retaliation, Jackson was plainly not within Title IX's intended protected class.¹³²

On appeal from the Eleventh Circuit, the U.S. Supreme Court granted a *writ of certiorari* to determine whether Title IX encompasses a third-party right of action for retaliation.¹³³ The Court agreed with petitioner Jackson that Title IX's private right of action encompasses claims of retaliation against an individual who complains of sex discrimination.¹³⁴

124. See *id.* at 1348 (affirming district court's dismissal of Jackson's complaint).

125. For a further discussion of Title IX, see *supra* notes 25-27 and accompanying text. Congress could have provided protection or relief for retaliation, but chose not to do so either explicitly or implicitly in Title IX. See *Jackson I*, 309 F.3d at 1345-46.

126. For a discussion of the relevant regulations, see *supra* notes 46-57 and accompanying text.

127. See *Jackson I*, 309 F.3d at 1338 (holding neither Title IX nor its regulation imply private right of action for retaliation).

128. See *id.* at 1338-39 (finding no private right of action in Title VI cases).

129. See *id.* at 1348 (discussing retaliation claims).

130. 532 U.S. 275, 293 (2001). For a further discussion of *Sandoval*, see *supra* notes 90-94 and accompanying text.

131. See *Sandoval*, 532 U.S. at 293 (finding no private right of action in Title VI cases).

132. See *Jackson I*, 309 F.3d at 1346 (determining Jackson as non-victim of gender discrimination under Title IX).

133. See *Jackson II*, 542 U.S. 903, 903 (2004) (granting certiorari to decide whether Title IX includes third party right of action for retaliation). The Court held oral arguments on November 30, 2004, and a question arose about the OCR's enforcement of claims. See Transcript of Oral Argument, *Jackson*, 544 U.S. 167 (2005) (No. 02-1672), 2004 U.S. TRANS. LEXIS 73, at *41 (Nov. 30, 2004). Respondents filed a motion for leave to file a supplemental brief containing enforcement dates. See Respondents' Supplemental Brief, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672). The motion was denied. See *Jackson v. Birmingham Bd. of Educ.*, 73 U.S.L.W. 3396 (Jan. 10, 2005) (No. 02-1672).

134. See *Jackson III*, 125 S. Ct. 1497, 1502 (2005) (holding Title IX includes claims of retaliation against individuals that complained of sex discrimination). The United States, as *amicus curiae*, supported Jackson. Together, the National School Boards Association, The American Association of School Administrators, The American Association of Presidents of Independent Colleges and Universities, The Association of Southern Baptist Colleges and Schools, and The Alabama Association of School Boards supported the respondent in an *amici curiae* brief. See

Writing for the majority, and joined by Justices Stevens, Souter, Ginsburg, and Breyer, Justice O'Connor reviewed relevant Supreme Court jurisprudence concerning Title IX.¹³⁵ Justice O'Connor discussed *Cannon* and its implied private cause of action to remedy intentional sexual discrimination under Title IX.¹³⁶ Next, Justice O'Connor discussed *Franklin v. Gwinnett County Public Schools* and its authorization of monetary damages for intentional violations of Title IX.¹³⁷ Additionally, Justice O'Connor discussed *Gebser v. Lago Vista Independent School District*¹³⁸ and its holding which she authored. She noted, "that the private right of action encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student"¹³⁹ Finally, Justice O'Connor discussed *Davis v. Monroe County Board of Education*, another opinion she authored, in which the Court extended Title IX's coverage to sexual harassment among students.¹⁴⁰ From these cases, the Court concluded that retaliation against a person who has complained of sex discrimination is another form of intentional sex discrimination actionable under Title IX.¹⁴¹

The majority acknowledged that Congress could have expressly mentioned retaliation in Title IX, as it did in Title VII.¹⁴² Nevertheless, the Court recognized the significant differences between Title VII and Title IX.¹⁴³ The Court held that Title IX is a broadly written general prohibition of discrimination on the basis of sex in educational institutions receiving federal funds. In contrast to Title

Brief for Jackson as Amici Curiae Supporting Petitioner, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672). Additionally, the states of Alabama, Delaware, Hawaii, Nevada, Oregon, South Dakota, Tennessee, Utah, and Virginia as *amici curiae* supported the respondent. See *id.* The Eagle Forum Educational and Legal Defense Fund, the National Wrestling Coaches Association, and the Pacific Legal Foundation each supported the respondent as *amici curiae*. See *id.* 135. See *Jackson III*, 125 S. Ct. at 1503 (discussing prior case law).

136. See *id.* at 1504 (discussing *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979)). For a further discussion of *Cannon*, see *supra* notes 58-60 and accompanying text.

137. See *Jackson III*, 125 S. Ct. at 1504 (analyzing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)). For a further discussion of *Franklin*, see *supra* notes 63-68 and accompanying text.

138. See *Jackson III*, 125 S. Ct. at 1504 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998)).

139. *Id.* (citing *Gebser*, 524 U.S. at 290-91).

140. See *id.* (discussing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)). For a further discussion of *Davis*, see *supra* note 84 and accompanying text.

141. See *Jackson III*, 125 S. Ct. at 1504 (O'Connor, J., majority) (stating conclusion that retaliation claims are within purview of Title IX).

142. See *id.* at 1504-05 (analyzing Title IX, 42 U.S.C. § 2000e-3(a) (2000)).

143. See *id.* at 1505 (distinguishing Title VII from Title IX).

VII, Congress did not state any prohibited discriminatory practices in Title IX.¹⁴⁴ Further, the broadly written Title IX does not require that the victim of the retaliation is also the victim of the discrimination.¹⁴⁵

The Court acknowledged that the school board was correct in asserting this requirement because of Title IX's origin. Because Title IX was passed under the Spending Clause, private actions are available only where recipients of federal funds have had adequate notice that they could be liable.¹⁴⁶ The majority stated that the school board should have been put on notice¹⁴⁷ due to the Court's 1979 ruling in *Cannon*,¹⁴⁸ holding Title IX broadly encompasses diverse forms of intentional sex discrimination. "A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation."¹⁴⁹

Justice Thomas dissented, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy. The dissenters would require Congress to unambiguously state any conditions placed on funding recipients because Title IX was enacted under Congress's spending power.¹⁵⁰ Furthermore, the dissenters opined that a claim of retali-

144. *See id.* at 1504-05 (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)). Furthermore, Congress enacted Title IX three years after *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *See Jackson III*, 125 S. Ct. at 1506. Thus, Congress must have been thoroughly familiar with the decision and must have expected that Title IX's enactment would be interpreted in conformity with its prohibition against retaliation. *See id.*

145. *See id.* at 1501 ("[I]t does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint."). Further, according to the Court, reporting incidents of sex discrimination is essential, and reporting would be discouraged if whistleblowers were not protected. *See id.* Teachers and coaches are often the best at identifying discrimination and bringing it to the attention of administrators. *See id.*

146. *See Jackson III*, 125 S. Ct. at 1501 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999)). The majority stated that the school board's reliance on *Alexander v. Sandoval* was misplaced. *See id.* For a discussion of which factors to consider when determining equal opportunity, see *supra* notes 38-41 and accompanying text.

147. *See id.* (emphasizing importance of notice).

148. For a discussion of the U.S. Supreme Court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), see *supra* notes 58-60 and accompanying text.

149. *Jackson III*, 125 S. Ct. at 1504 (noting *Jackson* will still have to prove on remand that he was retaliated against because he complained about sex discrimination).

150. *See id.* at 1510 (Thomas, J., dissenting) (requiring more comprehensive disclosure of limiting conditions).

ation is not a claim of sex discrimination, and the plain meaning of “on the basis of sex” is on the basis of one’s own sex.¹⁵¹

Additionally, the dissenters placed more weight on Title IX’s text, which does not mention retaliation.¹⁵² In contrast, retaliation is mentioned in Title VII,¹⁵³ the Americans With Disabilities Act,¹⁵⁴ and the Age Discrimination in Employment Act.¹⁵⁵ According to the dissent, a better assumption would have been if Congress intended to include a claim of retaliation, it would have expressly included such a claim.¹⁵⁶

As to the requisite notice, the dissenters stated that prior court jurisprudence “hardly gave notice to the Board here that retaliation liability loomed.”¹⁵⁷ Even more importantly, according to the dissent, “[T]he Court’s rationale untethers notice from the statute.”¹⁵⁸ The dissent concluded that:

[B]y crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute’s text. The question

151. *See id.* (Thomas, J., dissenting) (according to dissent, Jackson’s claim lacks requisite connection to actual sex discrimination).

152. *See id.* at 1511 (Thomas, J., dissenting) (“[T]hat the text of Title IX does not mention retaliation is significant.”).

153. *See* 42 U.S.C. § 2000e-3(a) (2005) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining.”). The statute also prohibits on-the-job training programs from discrimination, as well as labor organizations, from discriminating against any member or applicant for membership due to his opposition to an unlawful employment practice under this subchapter, “or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” *Id.*

154. *See* 42 U.S.C. § 12203(a) (2005) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”).

155. *See* 29 U.S.C. § 623(a) (1998) (prohibiting discrimination on basis of age).

156. *See Jackson III*, 125 S. Ct. at 1511 (Thomas, J., dissenting) (refuting majority’s recognition of retaliation claim). Therefore, Justice Thomas asserts the majority’s statement that Congress must have been aware of *Sullivan* and finding its inclusion of retaliation under Title IX was “wholly misplaced.” *Id.* at 1516 (Thomas, J., dissenting).

157. *Id.* at 1515 (Thomas, J., dissenting).

158. *See id.* (Thomas, J., dissenting) (“Rather than requiring clarity from Congress, the majority requires clairvoyance from funding recipients.”).

before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy.¹⁵⁹

D. CONCLUSION

Title IX and its regulations have played an important role in providing opportunities and preventing discrimination on the basis of sex to those who participate in and receive benefits from federally funded institutions.¹⁶⁰ Coaches, administrators, and student athletes must be aware of Title IX's complex regulatory environment and judicial interpretations. The U.S. Supreme Court has interpreted Title IX on numerous occasions.¹⁶¹ In March, 2005, the U.S. Supreme Court most recently held that Title IX's implied private right of action now also includes retaliation because an individual has raised concerns about sex discrimination.¹⁶² This landmark ruling now explicitly puts educational institutions receiving federal funds on notice that retaliating against an individual who complains about sex discrimination will not be allowed under Title IX. Thus, school boards and school districts should immediately amend policies, procedures, and Title IX enforcement to reflect this landmark Supreme Court decision in order to prevent retaliation against individuals who complain about sex discrimination. If an institution wishes to make an adverse decision against an individual who has previously complained of sex discrimination, the institution must ensure that the decision was non-retaliatory in nature, clearly documented, and legally defensible.¹⁶³

Retaliation is already prohibited in several federal employee protection statutes. Title VII of the Civil Rights Act of 1964,¹⁶⁴ the

159. *Id.* at 1517 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994)).

160. For a discussion on Title IX of Educational Amendment of 1972, see *supra* notes 25-27 and accompanying text.

161. For a further discussion on the extensive litigation and debate involving Title IX, see *supra* notes 8-17 and accompanying text.

162. For a summary on the landmark ruling in *Jackson v. Birmingham Bd. of Educ. (Jackson III)*, 125 S. Ct. 1497 (2005), see *supra* notes 19-22 and accompanying text.

163. For a discussion of the prohibition of discriminatory retaliation, see *supra* note 149. A plaintiff allegedly retaliated against must prove that the retaliation occurred as a consequence of complaining about sex discrimination. See *Jackson III*, 125 S. Ct. at 1507.

164. See 42 U.S.C. § 2000e-3(a) (2005) (making it unlawful for employer to discriminate against employee because employee has charged, testified, assisted, or participated in investigation, proceeding, or hearing under Title VII).

Age Discrimination in Employment Act,¹⁶⁵ the Americans with Disabilities Act,¹⁶⁶ and the Equal Pay Act¹⁶⁷ all statutorily prohibit an employer's retaliation. The essential elements of a retaliation claim are 1) the employee engaged in a protected activity,¹⁶⁸ 2) there was an adverse action by the employer, and 3) there is a causal connection between the protected activity and the adverse action.¹⁶⁹ In the 2004 fiscal year, the EEOC received 22,740 charges of retaliation discrimination based upon all statutes enforced by the EEOC.¹⁷⁰ In 2004, discharge was alleged in 66 percent of the suits filed by the EEOC with retaliation as a basis of the suit.¹⁷¹ The likely impact of *Jackson III* will be that more retaliation claims and suits will be filed by those alleging discrimination on the basis of sex in federally funded educational institutions.

The removal of sex discrimination from educational institutions which receive federal funds¹⁷² and the prohibition of retaliation against whistleblowers at such institutions are strongly supported. While this author concurs in the outcome of *Jackson III*, this author would be more comfortable with the prohibition coming from Congress instead of the courts. For example, Congress has expanded whistleblower protection under the Sarbanes-Oxley Act, which provides that publicly traded firms may not retaliate against their whistle-blowing employees.¹⁷³ Sarbanes-Oxley also explicitly criminalizes intentional retaliation, including the interfer-

165. For a further discussion of the Age Discrimination in Employment Act, see *supra* note 155 and accompanying text.

166. For a further discussion of the Americans with Disabilities Act, see *supra* note 154 and accompanying text.

167. 29 U.S.C. § 215(a)(3) (2005).

168. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL 3 (1998), <http://www.eeoc.gov/policy/docs/retal.html> (recognizing opposition to discrimination as protected activity).

169. See *id.* (acknowledging also participation in statutory complaint process as protected activity).

170. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RETALIATION 3 (2005), <http://www.eeoc.gov/types/retaliation.html> (remarking that EEOC actually resolved 24,751 retaliation charges in 2004, more than were filed that year, and recovered more than \$90 million in monetary damages).

171. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, OFFICE OF GENERAL COUNSEL FY 2004 ANNUAL REPORT-SUMMARY OF ACCOMPLISHMENTS 32 (2005), <http://www.eeoc.gov/litigation/04annrpt/index.html> (noting 66 percent of suits filed by EEOC alleged retaliation).

172. This author has been active in equity and gender equity issues in athletics at Bowling Green State University.

173. See 18 U.S.C. § 1514A (providing protection for whistleblowing employees of publicly traded companies in fraud cases).

ence with lawful employment, against whistleblowers.¹⁷⁴ Perhaps if the *Jackson III* decision had swung five-to-four in the other direction, Congress would have remedied this omission as they did with the Civil Rights Restoration Act¹⁷⁵ after the *Grove City College* case.¹⁷⁶ As the *Jackson III* dissent states,¹⁷⁷ this is not a statement about the merits of an anti-retaliation policy, but it is rather a statement that notice to the educational institutions affected must be *clear and unambiguous* under the Spending Clause. Instead, an anti-retaliation, pro-whistleblower policy would have been preferable.

Justice Sandra Day O'Connor, the first woman to serve on the U.S. Supreme Court, played a key role in upholding rights under Title IX. Justice O'Connor authored the majority opinion in *Jackson III*.¹⁷⁸ While Justice O'Connor concurred with the majority in the narrow holding in *Grove City College v. Bell*,¹⁷⁹ Justice O'Connor joined the majority in *Franklin v. Gwinnett County Public Schools*, holding that damages are available under Title IX.¹⁸⁰ Justice O'Connor authored the majority opinion in *Gebser*, which held that a school district is not liable in damages for sexual harassment by a teacher unless there was actual notice of and indifference to the teacher's conduct.¹⁸¹ A year later in *Davis v. Monroe County Board of Education*, however, Justice O'Connor authored the majority decision holding that student-on-student sexual harassment is actionable if the board acted with deliberate indifference and the

174. See 18 U.S.C. § 1513(e)(2005) (protecting individuals from employer's retaliatory conduct).

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined . . . or imprisoned not more than 10 years, or both.

Id.

175. See *supra* note 62 and accompanying text (exploring application of Civil Rights Restoration Act).

176. See *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984) (describing holding of case).

177. For an analysis of the Supreme Court's dissent in *Jackson III*, 125 S. Ct. 1497 (2005), see *supra* notes 157-59 and accompanying text.

178. See *Jackson III*, 125 S. Ct. at 1502-03 (listing Justice O'Connor as author of opinion).

179. For a discussion of the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), see *supra* notes 58-60 and accompanying text. Justice O'Connor was appointed and confirmed to the Court in 1981 and thus took no part in *Cannon* in 1979.

180. For a discussion of claims for monetary damages under implied right of private action under Title IX, see *supra* notes 63-68 and accompanying text.

181. For more information on Justice O'Connor's majority opinion in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), see *supra* note 82 and accompanying text.

harassment was sufficiently severe, pervasive, and offensive.¹⁸² The *Davis* majority consisted of Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer; while the more conservative Justices Scalia and Thomas, along with Kennedy and the Chief Justice Rehnquist, dissented. By authoring numerous of these opinions, Justice O'Connor has thus left her mark on Title IX jurisprudence.

At the time of this publication, Justice O'Connor has retired from the Court and Judge Samuel Alito has been confirmed. It is interesting to speculate that had *Jackson III* come to the Court one year later, it may have swung five-to-four the other way, leaving it to Congress to add retaliation to the Title IX statute, as other federal employee protection statutes provide.¹⁸³ Judge Alito, while serving on the Third Circuit Court of Appeals, authored an opinion in *Robinson v. City of Pittsburgh*,¹⁸⁴ which held that allegedly retaliatory conduct on the part of the employer did not give rise to a claim of retaliation. While Robinson's complaint with the EEOC for sexual harassment was a protected activity, the Third Circuit opined that the actions which occurred after the complaint did not give rise to adverse employment action.¹⁸⁵ Based upon this single retaliation in employment precedent, Judge Alito, given the opportunity, may have agreed with the dissent in *Jackson III*.

The *Jackson III* majority statement that school boards should have been on notice that retaliation under Title IX was actionable even prior to that decision is respectfully questioned.¹⁸⁶ School boards across this nation are filled with hard-working individuals dedicated to education and equality of all students, but it is uncer-

182. See *supra* note 84 and accompanying text (commenting on impact of Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)). Justice O'Connor joined the majority in *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), a Title VI and not a Title IX case, along with the more conservative justices. For a further discussion of *Sandoval*, see *supra* notes 90-94 and accompanying text.

183. See *supra* notes 164-67 and accompanying text (highlighting express statutory language in federal legislation addressing retaliation).

184. 120 F.3d 1286, 1300 (3d Cir. 1997).

185. See *supra* notes 168-69 and accompanying text (discussing definition of protected activity by EEOC). In addition, some of what Robinson claimed was retaliation allegedly occurred before the complaint was filed. See *Robinson*, 120 F.3d at 1300.

186. See *supra* note 147 and accompanying text (discussing Supreme Court's views regarding school board's notice). This author also prefers the inference that the dissent prefers: if Congress intended to include a clause in a statute, it would have expressly included it, rather than the majority's assumption that Congress was familiar with a prior Supreme Court decision in *Sullivan* and expected retaliation to be read into the statute. See *supra* note 156 (highlighting dissent's assumption about Congress's intention regarding retaliation).

tain whether all school boards were aware before *Jackson III* that retaliation should be read into Title IX's implied private rights of actions. Now, however, school boards are on explicit notice that such behavior will not be tolerated.

*Jackson v. Birmingham Board of Education (Jackson III)*¹⁸⁷ makes it clear that retaliation claims are now actionable under Title IX. Educational institutions receiving federal funds must now be even more diligent not to retaliate against an individual, male or female, who has complained about sex discrimination. Thus, Title IX's legacy, after thirty-four years, is still the pursuit of gender equity and the rights of those seeking gender equity in federally funded educational institutions.

187. 125 S. Ct. 1497 (2005).